Amendment.[17] The Court has held that the Amendment does not require of the States an indictment by grand jury in a prosecution for a felony,[18] nor does it prevent trial by a jury of eight,[19] nor does it require that a witness be exempt from compulsory self-incrimination,[20] although in a federal proceeding any of these objections might be successfully urged under the Constitution. The more recent decisions of the Supreme Court show clearly that in matters of criminal procedure the question of due process is largely left to the courts in the individual States.[21] In the absence of exceptional circumstances, therefore, the determination by the State court that the right to be present can be waived, would seem to be conclusive of the question, especially since the right is one which does not go to the very essence of criminal process.[22]

JURISDICTION OF ACTIONS AT LAW CONCERNING REALTY IN FOREIGN STATE.—Under the old common law, when juries consisted of witnesses from the vicinage who were acquainted with both the parties and the facts, the venue of an action had to be laid in the county where the injury was alleged to be done.[1] But as conditions changed, and the courts sought to enlarge their jurisdiction, they modified this rule by a fiction whereby a plaintiff could allege that the transaction occurred in any county in England where he wished to bring his suit, and this allegation of venue was not permitted to be traversed except where the court deemed its truth to be material.[2] In determining whether the venue was material, they drew a distinction between transitory and local actions,—"that is, between those in which the facts relied on as the foundation of the plaintiff's case have no necessary connection with a particular locality, and those in which there is such a connection."[3] It was said that real and mixed actions were local, and could be tried only by the courts of the locality where the land was situated, whereas personal actions were transitory, and could be tried anywhere.[4] This rule was so technical and so often worked injustice, that it was attacked by Lord Mansfield, who argued that the true distinction in respect of jurisdiction was between proceedings *in rem*, where the effect of the judgment cannot be had unless the thing lies within reach of the court, and actions *in personam*, where damages only are sought.[5] Lord Mansfield's view was approved by Chief Justice Marshall in the leading case of *Livingston* v. *Jefferson*,[6] and has been

[17]See McGehee, Due Process of Law, 167.

[18]Hurtado *v.* California (1884) 110 U. S. 516.

[19]Maxwell *v.* Dow (1900) 176 U. S. 581.

[20]Twining *v.* New Jersey (1908) 211 U. S. 78.

[21]Guthrie, Fourteenth Amendment, 101; McGehee, Due Process of Law, 167; Rogers *v.* Peck (1905) 199 U. S. 425, 434.

[22]See Garland *v.* Washington (1913) 232 U. S. 642, 646.

[1]1Holdsworth, History of English Law, 155, n. 9.

[2]W. S. Holdsworth, in 14 Columbia Law Rev., 551-556.

[3]See British South Africa Co. *v.* Companhia De Mocambique, L. R. [1893] A. C. 602, 618.

[4]Story, Conflict of Laws (8th ed.) § 538.

[5]See Mostyn *v.* Fabrigas (1774) 1 Cowp. 161.

[6](1811) Fed. Cas. No. 8411.

adopted by some of our States.[7] It has not been followed in England,[8] however, and even Marshall felt constrained to reject it for the established common law rule, which prevails generally in this country.

It is important, therefore, to note some of the main features of the rule as accepted and modified by our courts. The broad proposition is that an action at law for breach of a contract relating to lands is transitory,[9] whereas an action based on a tort against the same lands is local, whether the action is in trespass for direct injuries,[10] or on the case for indirect injuries such as flooding lands.[11] There is no valid reason for this distinction, and the idea that tort actions are local seems unsound in view of the fact that actions for torts against persons, or chattels, are regarded as transitory. This inconsistency is well illustrated in the recent case of *Potomac Milling & Ice Co.* v. *Baltimore & Ohio R. R.* (D. C. D. Md. 1914) 217 Fed. 665, where the plaintiff sued in Maryland to recover damages for the negligent destruction by fire of some buildings and their contents in West Virginia. The plaintiff's cause of action was simply his right to damages for the defendant's negligence. The negligence which resulted in the destruction of the buildings was the same as that resulting in the destruction of the contents. It would be proved by the same state of facts, and the defendant's responsibility for it would be the same; and yet the court was compelled to hold, reluctantly, that while it had jurisdiction of so much of the action as related to the destruction of the contents of the buildings, which were personal property, yet it could not take cognizance of the destruction of the buildings themselves, which were real property. This distinction is not only unsound, but it also frequently works injustice by depriving the plaintiff of all remedy so long as the defendant stays away from the jurisdiction where the land is located.[12]

The general rule has some important distinctions and exceptions. In the case of contracts, there is a distinction governing actions brought on covenants running with the land, to the effect that if the action is brought by or against a grantee of either the covenantor or the covenantee, and is, therefore, based on privity of estate instead of privity of contract, it is local and must be brought in the jurisdiction where the land is situated.[13] In the case of torts, an illogical exception exists where an act done in one State damages real property in another; for then, the plaintiff is allowed to bring his action in either jurisdiction.[14]

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[7]Little *v.* Chicago, etc. R. R. (1896) 65 Minn. 48; Holmes *v.* Barclay (1849) 4 La. An. 63. In a few States, the rule has been changed by statute. See Coleman *v.* Lucksinger (1909) 224 Mo. 1; Tillotson *v.* Pritchard (1887) 60 Vt. 94, 104 *et seq.*; Oliver *v.* Loye (1881) 59 Miss. 320.

[8]British South Africa Co. *v.* Companhia De Mocambique, *supra.*

[9]Mattix *v.* Swepston (1913) 127 Tenn. 693; Port *v.* Jackson (N. Y. 1819) 17 Johns. *239.

[10]Allin *v.* Connecticut River Lumber Co. (1890) 150 Mass. 560; Ellenwood *v.* Marietta Chair Co. (1895) 158 U. S. 105.

[11]Watts *v.* Kinney (N. Y. 1840) 23 Wend. 484; Eachus *v.* Trustees (1856) 17 Ill. 534.

[12]See Clark *v.* Scudder (Mass. 1856) 6 Gray 122; Karr *v.* New York etc. Co. (1909) 78 N. J. L. 198.

[13]White *v.* Sanborn (1833) 6 N. H. 220; Keyes etc. Co. *v.* Trustees (N. Y. 1911) 146 App. Div. 796, affd. 205 N. Y. 593; see Henwood *v.* Cheeseman (Penn. 1817) 3 S. & R. *500.

[14]Smith *v.* Southern Ry. (1909) 136 Ky. 162; Mannville Co. *v.* City of Worcester (1884) 138 Mass. 89.

In thus allowing a suit in the State where the wrongful act was committed, the court admits that it can take cognizance of the wrongful act alone, without having the land in its jurisdiction. If such wrongful act is transitory, as it certainly seems, there is no reason why it should not be made the basis of an action in any State where the defendant can be found. Another fine-drawn distinction arises where the cause of action consists in the removal of stone, timber, etc., from lands in other States. In this connection, many apparently conflicting decisions are reconciled when we observe that the question as to whether the action is local or transitory, depends entirely on the framing of the declaration. If the plaintiff ignores the damage to his freehold and simply brings a personal action, such as conversion, for the value of the timber or minerals removed, the action is transitory;[15] but if any part of the damages claimed is for injury to the freehold, the action is local.[16] Finally, a distinction which would have enabled the court in the principal case to take jurisdiction of the entire action, is made in some States between actions in trespass for direct injuries to land, and actions on the case for indirect injuries. According to this rule, where, as here, the gravamen of the action is simply the negligence of the defendant, such as permitting sparks to escape from locomotives, the action is transitory.[17] But even this doctrine has been repudiated by the weight of authority,[18] according to which the principal case is correct.

A LIMITATION ON THE RIGHT TO SUBROGATION.—A seemingly well-defined limitation on the doctrine of subrogation, a doctrine unusually difficult of definition, is the rule that subrogation will not be allowed to one who was personally and primarily liable on the debt which he has paid, for the reason that payment by one so liable operates to extinguish the debt with its lien. Within this description has been included the grantee of incumbered premises who has agreed to discharge the incumbrance. Although a typical case for subrogation is presented when a grantee who has merely taken subject to the incumbrance, discharges it in ignorance of a junior lien which by his payment will be given priority,[1] a strong line of decisions denies such relief to the grantee who by his agreement has made himself personally liable on the obligation.[2] It is difficult to see why this distinc-

[15]Hodges *v.* Hunter Co. (1911) 61 Fla. 280; Stone *v.* United States (1896) 167 U. S. 178, 182.

[16]Ophir Silver Mining Co. *v.* Superior Court (1905) 147 Cal. 467; Kentucky etc. Co. *v.* Mineral Development Co. (C. C. 1911) 191 Fed. 899.

[17]Ducktown Sulphur, etc. Co. *v.* Barnes (Tenn. 1900) 60 S. W. 593, 606; Home Ins. Co. *v.* Penn. R. R. (N. Y. 1877) 11 Hun 182; *cf.* Titus *v.* Frankfort (1838) 15 Me. 89.

[18]Brisbane *v.* Penn. R. R. (1912) 205 N. Y. 431 (three judges dissenting); Du Breuil *v.* The Pennsylvania Co. (1891) 130 Ind. 137; *cf.* Watts *v.* Kinney, *supra.* The addition in 1913 of § 982-a to the N. Y. Code of Civ. Proc., changed the rule in the Brisbane case, and makes the rule as to real property the same as the rule governing personal property.

[1]Barnes *v.* Mott (1876) 64 N. Y. 397; Ryer *v.* Gass (1881) 130 Mass. 227; Hudson *v.* Dismukes (1883) 77 Va. 242.

[2]Lackawanna Trust etc. Co. *v.* Gomeringer (1912) 236 Pa. 179; Cady *v.* Barnes (D. C. 1913) 208 Fed. 361; Poole *v.* Kelsey (1900) 95 Ill. App. 233; DeRoberts *v.* Stiles (1901) 24 Wash. 611; McDowell *v.* Lumber Co. (1906) 42 Tex. Civ. App. 260; Willson *v.* Burton (1880) 52 Vt. 394.